No. 17-333

In the Supreme Court of the United States

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellants,

v.

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections,*

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OPPOSING MOTION TO AFFIRM

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INTRODUCTION

The State does not deny that the First Amendment prohibits lawmakers from singling out citizens for disfavored treatment by reason of their voting histories and political-party affiliations. Nor does it expressly defend the three-judge court's mistaken holding that a partisan gerrymander does not inflict an actionable injury unless it changes the outcome of all elections—past and future—held under the gerrymandered map.

The State instead offers an inaccurate account of the proceedings below and a skewed, unsupported take on the evidence. It also asks the Court to affirm on alternative discretionary grounds (which the Court may not do) and renews its contention that plaintiffs' First Amendment retaliation claim is nonjusticiable (which is wrong). Yet, through all of this, the State does not deny that the questions presented are substantial and that plenary review is warranted. The Court accordingly should order full briefing and argument and then reverse.

ARGUMENT

A. The questions presented are substantial

1. Plaintiffs have proven identifiable concrete injuries resulting from the 2011 gerrymander

a. We have consistently argued that the injury inflicted by a partisan gerrymander is vote dilution, and that vote dilution is an actionable injury in a First Amendment case like this one if it produces demonstrable, concrete adverse effects. We made this argument opposing the State's motion to dismiss (MTD Opp. 2, 14-16 (Dkt. 68); MTD Surreply 2 (Dkt. 85); 7/12/16 Hrg. Tr. 42:5-21) and in favor of a pre-

liminary injunction (PI Mot. 2, 16-18 (Dkt. 177-1); PI Reply 11-15 (Dkt. 191); 7/14/17 Hrg. Tr. 126:15-20).

In support of our motion for a preliminary injunction, in particular, we argued that the dilution of Republican votes in the Sixth District resulted in a concrete, identifiable injury because it had exactly the effect that the mapdrawers intended to bring about: It altered the outcomes of the elections in the district. See PI Mot. 2, 16-18. We argued that the dilution of votes had the additional, concrete effect of suppressing political engagement among voters in the old Sixth District. *Id.* at 18-19; PI Reply 14-15.

Against this background, the State's bizarre assertion that we have "den[ied]" and attempted to "shirk" our burden to prove a "demonstrable and concrete adverse effect" (Mot. 11-12) is unequivocally wrong. Our position on this point is not a "new" one (Mot. 12); rather, it has been the organizing principle around which this case has been litigated for the past two years, as the State well knows.[1]

Equally puzzling is the State's false accusation (Mot. 12) that we have "steadfastly refused to define" vote dilution and failed to "proffer[] * * * data supported by expert explication, describing the extent to which [plaintiffs] allege their votes were diluted." We

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[1] The State (like the majority below) seizes on a single, out-of-context sentence from our PI reply brief to suggest that we conceded that it was plaintiffs' burden to prove every electoral outcome since 2011 has been attributable to the gerrymander. See Mot 7-8, 11. That also is false. The quoted sentence was, in fact, a *refutation* of the State's assertion that plaintiffs had to prove that the Sixth District was "not winnable," ever, by a Republican. PI Reply 13. And it was a description, not of our legal burden, but of the factual arguments that we had made in support of the preliminary injunction.

have, in fact, repeatedly explained that vote dilution is the manipulation of district lines to diminish the weight of votes cast for opposition-party candidates. *E.g.*, MTD Surreply 1 (citing *Davis* v. *Bandemer*, 478 U.S. 109, 131 (1986) (plurality)); PI Reply 11-12. This is hardly a novel concept—this Court recognized nearly 50 years ago that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 569 (1969).

To establish the fact of vote dilution here, we offered (among other things) the analysis of Dr. Michael McDonald, a renowned redistricting expert. See Dkt. 177-19. Using techniques from Voting Rights Act cases, Dr. McDonald analyzed demographic and historical election data (*id.* at 2) and concluded that the Sixth District "was drawn in a manner that has the effect of diminishing the ability of registered Republican voters to elect candidates of their choice." *Id.* at 3. The State's own expert agreed. See Dkt. 177-49, at 39:1-4 (describing the dilution of Republican votes as "obvious[]" and "a fact"). Dr. McDonald further concluded that the vote dilution was so severe in this case that it changed the election outcomes in 2012 through 2016. Dkt. 177-19, at 3-4, 17. Thus, the State's assertion (Mot. 12) that we have not supported our claim with "data supported by expert explication" is categorically untrue.[2]

b. The order denying the preliminary injunction imposed a new requirement, demanding more than a showing that the dilution of Republican votes in the district had *some* practical, adverse effect. Breaking

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[2] Contrary to the State's assertion (Mot. 13), Dr. McDonald considered unaffiliated voters because he analyzed actual election returns, not just affiliation data. Dkt. 186-41, at 48:10-49:4.

from the motion-to-dismiss decision, it held that the *only* way to establish a concrete injury is to show that electoral outcomes were and will be changed in all past and future elections. J.S. App. 17a.

The State does not expressly defend this new change-every-election standard; instead, it rehashes its unsupported speculations about "the myriad election-specific factors that influence voters," including what it vaguely describes as a "changing political landscape." Mot. 16-18. But as Judge Niemeyer explained (J.S. App. 77a), our burden is not "to eliminate all possible but unproved factors, however remote and speculative." It is, instead, to show that it is more likely than not that the dilution of Republican votes in the Sixth District was severe enough to change the outcome of *an* election or to make some other concrete, more-than-*de-minimis* difference. *Ibid.* The predictive indices that we relied upon below to show changed election outcomes were more than sufficient to meet that burden. See J.S. 11-13, 21-23; J.S. App. 52a-53a, 69a-70a (Niemeyer, J.).

Our burden was further satisfied because we showed that the 2011 gerrymander has concretely suppressed political engagement in the Sixth District. J.S. 13, 22-23; PI Reply 14-15. The State asserts in response (Mot. 18-19) that the gerrymander made the Sixth District "newly competitive," which it surmises may have increased political engagement. But the evidence shows the exact opposite: The district was virtually certain to be won by a Democrat, as everyone knew. See J.S. 12-13, 21-22. In any event, the State cites for support only party registration data, which is less relevant than actual turnout

data;[3] and plaintiffs' testimony about their personal political involvement, which is irrelevant because the chilling inquiry is objective, not subjective. See J.S. App. 70a (Niemeyer, J.) (citing cases).[4]

2. *The majority erred by not applying the* Mt. Healthy *burden-shifting framework*

We showed (J.S. 29-31) that the majority's rejection of the *Mt. Healthy* burden-shifting framework followed from its misunderstanding of plaintiffs' injury. Evidently unwilling to defend that misunderstanding, the State does not defend the majority's reasoning with respect to *Mt. Healthy*. It instead argues (Mot. 19-22) that *Mt. Healthy* should not apply because redistricting is "complex," involving "manifold choices" by "multiple decisionmakers."

There is no basis for a "complex cases" exception to the *Mt. Healthy* framework. This Court's holding in *Hartman* v. *Moore*, 547 U.S. 250 (2006), was expressly limited to retaliatory prosecutions; the Court reaffirmed the rule applicable outside that idiosyncratic context that, "upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of." *Id.* at 260.

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[3] The State asserts (Mot. 18 n.5) that primary turnout data is irrelevant. But voting in primaries is every bit as much participation in the political process as is voting in the general election. In any event, general election turnout also has been depressed since the 2011 gerrymander. See PI Reply 14-15.

[4] The State faults us (Mot. 18) for relying on hearsay. But the lower courts uniformly agree that hearsay is admissible at preliminary injunction hearings. See *G.G. ex rel. Grimm* v. *Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir.) (collecting cases), vacated on unrelated grounds, 137 S. Ct. 1239 (2017).

The State has not remotely shown that the Sixth District would have been redrawn in such politically-targeted ways absent the specific intent to burden Republican voters. See J.S. App. 72a-74a (Niemeyer, J.). Consider, for example, the targeting of Frederick—an island of blue in a sea of red, assigned with laser-like precision to the Sixth District:

Dkt. 177-19, at 23. As Dr. McDonald proved, moreover, it would have been easy to draw the Sixth District without such blatant political targeting—and also without affecting the "myriad" decisions affecting the lines of other districts apart from the Eighth:

Figure Eight. Alternative Sixth and Eighth Congressional Districts

3. The Court cannot affirm on alternative discretionary grounds

Citing evidence not presented below, the State asks the Court to affirm on alternative grounds. Mot. 22-25. But those issues are not before this Court. On review of a decision granting or denying injunctive relief, an appellate court must determine whether the lower court's exercise of discretion, *such as it was*, was an abuse (*Sherley* v. *Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011)), including whether the court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence" (*Highmark Inc.* v. *Allcare Health Mgmt. Sys.*, 134 S. Ct. 1744, 1748 (2014)). A reviewing court may not substitute its own discretionary considerations in place of the district court's when it finds that the district court's considerations were based on an error of law or clear error of fact. See also *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (this Court "will decline to consider [disputed] questions in the first instance").

Regardless, plaintiffs have litigated this case as speedily as possible. See Reply on Mot. to Expedite 2-3. Seeking preliminary relief before the 2018 election was not practicable, and the need for preliminary relief in 2018 was necessitated only by the State's own, acknowledged delay tactics. *Id.* at 3. The question whether there is now enough time to award preliminary relief is one for the district court.

B. Partisan gerrymandering claims are justiciable under the First Amendment retaliation doctrine

The State contends (Mot. 26-34) that the three-judge court was wrong to hold that plaintiffs' First Amendment retaliation claim is justiciable. Its argu-

ments on this point are unpersuasive—and only confirm that plenary review is warranted.

1. Applied here, the First Amendment retaliation doctrine is manifestly justiciable. Consistent with the same concrete-burden requirement applicable to all First Amendment retaliation claims (*e.g.*, *Zherka* v. *Amicone*, 634 F.3d 642, 646 (2d Cir. 2011)), a plaintiff challenging a partisan gerrymander under the First Amendment must demonstrate vote dilution that is "sufficiently serious to produce a demonstrable and concrete adverse effect." J.S. App. 106a. For this reason, we have focused not on statistical measures of "partisan bias" or the like (which are at best proxies for practical effects), but on the practical effects of gerrymandering themselves, as would a plaintiff pressing a First Amendment retaliation claim in any other context. See *Zherka*, 634 F.3d at 646 (a "concrete harm [must be] alleged and specified"; neither "hurt feelings" nor purely abstract injuries will suffice).

This concrete-burden standard turns on the same reasoned, manageable distinctions that govern every lawsuit in federal court. See, *e.g.*, *Doe* v. *Public Citizen*, 749 F.3d 246, 264 (4th Cir. 2014) (the plaintiff's injury, which was "shared by a large segment of the citizenry," was "sufficiently concrete" for the federal courts to address it). And measuring the significance of vote dilution by evaluating whether it produces a concrete burden is a natural reflection of the fact that majority parties draw partisan gerrymanders for practical reasons, not academic ones—they do it to suppress political support for the opposition and, ultimately, to change electoral outcomes. Cf. *Vieth* v. *Jubelirer*, 541 U.S. 267, 297 (2004) (plurality opinion) (the measure of injury must focus on a gerry-

mander's "effect * * * on the electoral success, the electoral opportunity, or * * * the political influence" of plaintiffs' political party).

2. The State responds with three contentions that go to the merits of the retaliation theory, not its justiciability.

First, the State asserts (Mot. 27-28) that a retaliation claim cannot be based on citizens' voting histories because "voting history is *unknowable* by the government" except on a precinct-by-precinct level, which is supposedly not specific enough. Nonsense. Courts routinely adjudicate allegations that the State has intentionally targeted groups of citizens rather than specific individuals, as they do in all racial gerrymandering cases. See, *e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455, 1466 (2017); *Bush* v. *Vera*, 517 U.S. 952, 958 (1996) (plurality opinion). "The fact that the State moved Republican voters out of the Sixth District *en masse*, based on precinct-level data, and did not examine each voter's history with care before taking [its] punitive action does not make its action less culpable under the First Amendment." J.S. App. 67a (Niemeyer, J.).

Second, the State asserts (Mot. 28-30) that vote dilution cannot be a burden on First Amendment rights because it is does not "directly" burden free speech, and a redistricting law is a law of general applicability that "affects all Maryland residents in the same way." These are puzzling assertions; vote dilution assuredly *does* directly burden representational rights (*e.g.*, J.S. App. 89a (quoting *Vieth*, 541

U.S. at 314 (Kennedy, J., concurring)),[5] and a map that selectively burdens citizens based on protected conduct (or, for that matter, race) assuredly does *not* affect all citizens in the same way.

Finally, the State complains (Mot. 30-32) that application of the First Amendment retaliation doctrine to redistricting would mean that legislatures could not intentionally dilute certain citizens' votes because of their past voting histories and party affiliations, even to "make previously uncompetitive districts more so." So long as such efforts are not narrowly tailored to serve a compelling governmental interest, that is exactly right: A State may not deliberately discriminate against citizens based on their support of particular politicians or political parties. Such viewpoint discrimination is anathema to the First Amendment and cannot ever be "what democracy requires" (Mot. 32). See Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. (forthcoming Dec. 2017).

3. The State asserts (Mot. 32-34) that the First Amendment retaliation doctrine is nonjusticiable in this case because it is impossible to determine how voters would behave in hypothetical elections held under alternative maps. For plaintiffs to overcome this problem, the State asserts (Mot. 34), "thousands

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[5] See also Daniel P. Tokaji, *Voting Is Association*, 43 Fla. St. U. L. Rev. 763 (2016) (arguing that the right of expression association is bound up with the right to vote). The State cites *Nevada Commission on Ethics* v. *Carrigan*, 564 U.S. 117 (2011), for the startling proposition that voting in public elections is not protected by the First Amendment. Mot. 27 n.8. But *Carrigan* was about a legislator's exercise of legislative power, not his "personal franchise." *Id.* at 126.

of people would need to be interrogated about their past voting behavior," which is impractical.

That position is doubly wrong. *First*, it is contrary to the parties' joint stipulation that "data reflecting Maryland citizens' political party affiliations and voting histories[] can be used to determine how the outcome of historical elections would have changed in the [Sixth] District if [an alternative redistricting plan] had been in place in prior years, including in 2010." Dkt. 177-5 ¶ 30. Indeed, it is a self-evident premise of gerrymandering that map-drawers can accurately predict election outcomes using precinct-wide data concerning party affiliations and voting histories.

Second, use of surveys is commonplace in litigation, even in vote-dilution cases. See, *e.g.*, *LULAC* v. *Clements*, 999 F.2d 831, 880 (5th Cir. 1993) (en banc) (expert analysis of survey data was among the "overwhelming evidence that election outcomes were the product of partisan affiliation"). To be sure, it would be costly to conduct and analyze a survey of Sixth District residents concerning their voting behavior—but that does not mean that plaintiffs' claim is non-justiciable if a survey becomes necessary.

C. The Court should order plenary review without holding this appeal for *Gill*

The three-judge court's approval of the First Amendment retaliation doctrine as a justiciable framework for deciding partisan gerrymandering claims is, so far as we are aware, a first in the long history of gerrymandering litigation. The district court thus expressed a desire for this Court's "guidance" on the merits of the theory (J.S. App. 31a, 33a), hoping that it might receive that guidance from this Court's disposition of *Gill* v. *Whitford*, No. 16-1161. But

because there are significant substantive differences between the two cases (J.S. 32-33), that is implausible.

Each of the issues submitted for decision in *Gill* is unique to the "partisan asymmetry" theory and its statewide character. The defendants in *Gill* argue that (1) plaintiffs lack standing to bring a statewide claim, (2) statewide gerrymandering claims are not justiciable, and (3) partisan asymmetry is an unworkable standard. This Court's resolution of those questions will not shed any light on plaintiffs' single-district First Amendment retaliation claim; it would be no answer to the concrete injury inflicted upon plaintiffs here to observe that far-off voters in another district had successfully elected a Republican, or to conclude that the 2011 map is "fair" to Marylanders on the whole, according to some abstruse statistical metric. Plaintiffs' single-district challenge depends upon the practical and observable effects of gerrymandering, not academic abstractions.

The State does not disagree that the two cases are fundamentally different (cf. Mot. 12-13) and does not ask the Court to hold this appeal. The Court therefore should order plenary review without awaiting a decision in *Gill*.

CONCLUSION

The Court should note probable jurisdiction and reverse.

Respectfully submitted.

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